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## II INTERNATIONAL CRIMINAL COURT

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Many things have happened in relation to the International Criminal Court (ICC) in the past six months, some of which were not only interesting from a purely legal perspective but also showed the larger, at times challenging context in which the Court must operate.<sup>1</sup> Three particular examples come to mind. First, Trial Chamber (TC) II acquitted Mathieu Ngudjolo Chui on 18 December 2012.<sup>2</sup> Those who had been following the case met this judgment, which created the Court's present 50/50 score of convictions and acquittals, with shock and disappointment.<sup>3</sup> Second, ICC indictee Uhuru Muigai Kenyatta won the presidential elections in his home country Kenya on 9 March 2013,<sup>4</sup> while his case, as well as the case of his running mate William Samoei Ruto, was heading for trial. Third, Pre-Trial Chamber (PTC) I had still not ruled on the admissibility challenge regarding Saif al-Islam Gaddafi's case in the Libyan situation, while litigation on privileges and immunities of ICC staff members temporarily took center stage.

The ICC's first acquittal was unanimous. Mathieu Ngudjolo Chui had been on trial together with Germain Katanga, but the charges against the two had been severed on 21 November 2012, in the middle of the deliberation phase and only a month before Ngudjolo's acquittal.<sup>5</sup> The issuance of the severance decision at such a late stage

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<sup>1</sup> This news update covers the period from October 2012 till late March 2013.

<sup>2</sup> *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, Trial Chamber II, Case No. ICC-01/04-02/12-3, 18 December 2012.

<sup>3</sup> See e.g. Ohlin, J.D., 'Bombshell Acquittal at the ICC', *LieberCode*, 18 December 2012, available at: [www.liebercode.org/2012/12/bombshell-acquittal-at-icc.html](http://www.liebercode.org/2012/12/bombshell-acquittal-at-icc.html) (last visited 10 March 2013); Sena, J., 'Mathieu Ngudjolo Chui: Reflections on the ICC's First Acquittal', *Opinio Juris*, 24 December 2012, available at: <http://opiniojuris.org/2012/12/24/mathieu-ngudjolo-chui-reflections-on-the-iccs-first-acquittal/> (last visited 10 March 2013); Kersten, M., 'The ICC and Justice in the Wake of the Ngudjolo Acquittal', *Justice in Conflict*, 26 December 2012, available at: <http://justiceinconflict.org/2012/12/26/the-icc-and-justice-in-the-wake-of-the-ngdjolo-acquittal/> (last visited 10 March 2013).

<sup>4</sup> Patinkin, J., 'Uhuru Kenyatta Wins Kenyan Election by a Narrow Margin', *Guardian*, 9 March 2013, available at: [www.guardian.co.uk/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections](http://www.guardian.co.uk/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections) (last visited 10 March 2013).

<sup>5</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, Trial Chamber II, Case No. ICC-01/04-01/07, 21 November 2012.

triggered the first speculations that the Ngudjolo case might result in an acquittal. This acquittal theory was strengthened by the fact that the TC also recharacterised the mode of liability for Katanga on the basis of Article 25(3)(d) of the Rome Statute, namely complicity in the commission of a crime by a group of persons acting with a common purpose, a lesser degree of participation than the initially charged form of indirect co-perpetration.<sup>6</sup>

With respect to Ngudjolo, the Prosecution had alleged that he was the former leader of the armed rebel group *Front des Nationalistes et Intégristes* (FNI) operating in the Ituri region of the Democratic Republic of Congo (DRC). Ngudjolo was charged, based on Article 25(3)(a), with the commission, jointly with Germain Katanga, of an attack against Bogoro village on 24 February 2003 that left 200 civilians dead. In total, Ngudjolo was accused of three counts of crimes against humanity (murder, sexual slavery, and rape) and seven counts of war crimes (willful killing, directing an attack against civilians, pillage, the destruction of property, the use of child soldiers, rape, and sexual slavery).<sup>7</sup>

The factual linkage problem that led to the acquittal found its basis in the unreliability of several key witnesses.<sup>8</sup> The TC found that it had not been proven beyond a reasonable doubt that Ngudjolo was indeed the leader of the FNI at the time of the attack on Bogoro in February 2003.<sup>9</sup> He could therefore not be held criminally responsible for the crimes committed during the attack the way the Prosecution had alleged. This did not mean, as the TC curiously emphasised in paragraph 36 of its Judgment, that it found Ngudjolo to be innocent; it merely meant that the evidence did not support a conviction under the Rome Statute's standard of proof.

While the acquittal is noteworthy in itself for the shortcomings in the evidence the Prosecution relied upon, it was Judge Christine van den Wyngaert's concurring opinion that attracted most of the attention in legal circles. Judge Van den Wyngaert seized the opportunity to express her views on the interpretation of Article 25(3)(a) of the Rome Statute. Since the Confirmation of Charges decision in the Lubanga case in early 2007, pre-trial chambers have consistently interpreted Article 25(3)(a) using the Control of the Crime theory.<sup>10</sup> The TC in Lubanga was the first Trial Chamber to endorse this theory, from which Judge Fulford distanced himself in his separate opinion to that Judgment. With Judge Van den Wyngaert's opinion, there are now two ICC judges voicing opposition to this theory employed at the Court.

To quickly summarise, the Control of the Crime theory, borrowed from German scholar Claus Roxin, entails interpreting Article 25(3)(a)'s mode of liability co-perpetration (committing "jointly with another") as attaching only to individuals

<sup>6</sup> *Ibidem*, para. 7. At the time of writing, no judgment had been rendered in the Katanga case.

<sup>7</sup> *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, Trial Chamber II, Case No. ICC-01/04-02/12-3, 18 December 2012, at paras. 7–10.

<sup>8</sup> *Ibidem*, at paras. 496–497.

<sup>9</sup> *Ibidem*, at paras. 499–503, 516.

<sup>10</sup> *Ibidem*, at para. 4 (Judge Christine van den Wyngaert, Concurring Opinion).

who can be said to have control over the crime. The reason for applying this theory is twofold. First, it enables making a distinction between principals and accessories, and second, it ensures that liability for principals is extended to those individuals who exercise control over the crime, regardless of their absence from the scene of the crime. As long as the co-perpetrator masterminds the crime and makes an essential contribution in accordance with the common plan, liability attaches.<sup>11</sup>

In her concurring opinion, Judge Van den Wyngaert raised six points. First, the Control of the Crime theory is inconsistent with Article 22(2) (*nullum crimen sine lege*) and with the ordinary meaning of Article 25(3)(a).<sup>12</sup> Second, the premise on which the theory is based is unacceptable, namely the idea that there exists a hierarchy of blameworthiness in the modes of liability listed in Article 25(3).<sup>13</sup> Third, the theory's treatment of the common plan as an objective element, as opposed to a subjective element, is incorrect, because treating it as an objective element focuses on the accused's link to the common plan instead of the accused's connection to the crime.<sup>14</sup> Fourth, the 'essential contribution' requirement has no legal basis, and should be replaced by a 'direct contribution' requirement.<sup>15</sup> Fifth, the PTC's interpretation in the Lubanga case of indirect perpetration (the last part of Article 25(3)(a), namely commission "through another person") erroneously relies on Roxin's scholarly work again, i.e. the notion of *Organisationsherrschaft* in the sense of acting through an organisation. This does not find support in the Rome Statute.<sup>16</sup> And finally, the novel notion of indirect co-perpetration, a combination of indirect perpetration (through another person) and co-perpetration (jointly with another), goes beyond the terms of the Rome Statute and is therefore also incompatible with Article 22's *nullum crimen sine lege* principle.<sup>17</sup>

While Judge Fulford had raised a number of the same issues in his separate opinion to the Lubanga Judgment, a couple of elements discussed by Van den Wyngaert deserve extra attention here. Both judges agreed that the essential contribution requirement is not the standard that ought to be applied. However, Judge Van den Wyngaert offered a different solution than Judge Fulford. The latter pointed out that requiring an essential contribution results in a hypothetical investigation into what would have happened had the accused not been involved.<sup>18</sup> Judge Fulford argued that a plain reading of the

<sup>11</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, Case No. ICC-01/04-01/06, 14 March 2012, at paras. 984, 1000, 1003–1004. For a summary of the Trial Chamber's reasoning in Lubanga in relation to the Control Theory see Fry, E., 'Human Rights News: International Criminal Court', *Netherlands Quarterly of Human Rights*, Vol. 30, No. 2, 2012, pp. 230–237, at p. 230–231.

<sup>12</sup> *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, Trial Chamber II, Case No. ICC-01/04-02/12-3, 18 December 2012, at paras. 6, 9–21 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>13</sup> *Ibidem*, at paras. 6, 22–30 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>14</sup> *Ibidem*, at paras. 6, 31–39 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>15</sup> *Ibidem*, at paras. 6, 40–48 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>16</sup> *Ibidem*, at paras. 49–57 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>17</sup> *Ibidem*, at paras. 58–64 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>18</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, Trial Chamber I, Case No. ICC-01/04-01/06, 14 March 2012, at para. 17 (Judge Adrian Fulford, Separate Opinion).

text of the Rome Statute asks for '[a] contribution to the crime, which may be direct or indirect, provided either way there is a *causal link* between the individual's contribution and the crime.'<sup>19</sup> Judge Van den Wyngaert took a different approach. Although she also pointed out that the essential contribution requirement finds no basis in the Rome Statute and results in an unrealistic assessment of the level of contribution, she did not agree that the test should then be one that focuses on the causal link between the accused's contribution and the crime.<sup>20</sup> Rather, Judge Van den Wyngaert argued that there must be 'a *direct* contribution to the realisation of the material elements of the crime.'<sup>21</sup> She explained further that '[w]hat is required by a "direct" contribution is an immediate impact on the way in which the material elements of the crimes are realised. Whether a contribution qualifies as direct or indirect is not something that can be defined in the abstract. It is something the Court must appreciate in the specific circumstances of each case.'<sup>22</sup> It is a bit unfortunate that Judge Van den Wyngaert did not offer additional guidance regarding the contribution element in her otherwise excellent concurring opinion. Discussions on the Control of the Crime theory often center on what should be the required level of contribution. Although the Court's case law now shows a clear preference for demanding the level of contribution to be essential, it is fair to say we have not seen the end of the contribution debate in relation to the controversial Control of the Crime theory employed at the ICC.

A second issue worth highlighting relates to the sixth issue Judge Van den Wyngaert raised in her concurring opinion, namely the hybrid mode of liability 'indirect co-perpetration.' It must be noted that while the Lubanga case dealt with direct perpetration, the Ngudjolo and Katanga case was the first dealing with the novel mode of liability that combines indirect perpetration and co-perpetration. Judge Van den Wyngaert argued that the Rome Statute offers no basis for such a newly devised mode of liability as it stretches 'well beyond a common-sense combination of forms of criminal responsibility.'<sup>23</sup> Such an expansive reading of Article 25(3)(a) is inconsistent with the *nullum crimen sine lege* principle of Article 22 of the Statute.<sup>24</sup> Although not categorically against combining modes of liability, Judge Van den Wyngaert argued that this 'radical expansion' of Article 25(3)(a) makes it possible to 'hold the accused responsible for the conduct of the physical perpetrator of a crime, even though he/she neither exercised any direct influence or authority over this person, nor shared any intent with him or her.'<sup>25</sup> Despite being quite similar to the third variant of Joint Criminal Enterprise (JCE) as developed in case law at the International Criminal

<sup>19</sup> *Ibidem*, at para. 16 (Judge Adrian Fulford, Separate Opinion) [emphasis added].

<sup>20</sup> *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, Trial Chamber II, Case No. ICC-01/04-02/12-3, 18 December 2012, at para. 43 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>21</sup> *Ibidem*, at para. 44 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>22</sup> *Ibidem*, at para. 46 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>23</sup> *Ibidem*, at para. 63 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>24</sup> *Ibidem*, at para. 64 (Judge Christine van den Wyngaert, Concurring Opinion).

<sup>25</sup> *Ibidem*, at para. 61 (Judge Christine van den Wyngaert, Concurring Opinion).

Tribunal for the former Yugoslavia (ICTY), this form cannot be used at the ICC, as JCE was based on customary international law.<sup>26</sup>

Returning to Mathieu Ngudjolo Chui, he was released from custody three days after his acquittal, on 21 December 2012.<sup>27</sup> The Prosecutor has appealed both the acquittal and Ngudjolo's release pending the appeal.<sup>28</sup> After his release, Dutch authorities immediately detained Ngudjolo, as he did not have the proper documentation allowing him to stay in the country. The Netherlands argued that Ngudjolo had technically never been on Dutch soil. In the meantime, Ngudjolo applied for asylum in the Netherlands, where he remained in detention at Schiphol Airport.<sup>29</sup> With respect to Ngudjolo's former co-accused, Germain Katanga was still waiting for the judgment in his case early spring 2013.

While Ngudjolo's acquittal certainly shocked many observers of the Court and undoubtedly left some involved quite frustrated, the developments in the Kenya cases seem to have even further-reaching ramifications of a more political nature. PTC II authorised the investigation into the Kenyan situation, the Prosecutor's first *proprio motu*, in March 2010.<sup>30</sup> Two cases followed from the investigation, and on 23 January 2012, PTC II confirmed the charges against four of the six suspects of the 2007/2008 post-election violence; William Ruto together with Joshua Sang, and Francis Muthaura together with Uhuru Kenyatta were to face trial.<sup>31</sup>

Initially, both trials were set to start early April 2013.<sup>32</sup> However, on 8 March 2013, the commencement of trial in the case against Ruto and Sang was postponed until 28 May 2013 due to disclosure delays and a 'shift in focus' of the Prosecution's case.<sup>33</sup>

<sup>26</sup> *Ibidem*, at para. 61, n. 77 (Judge Christine van den Wyngaert, Concurring Opinion). For further reading on indirect co-perpetration see Ohlin, J.D., 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', *Leiden Journal of International Law*, Vol. 25, No. 3, 2012, pp. 771–797.

<sup>27</sup> International Criminal Court Press Release, ICC-CPI-20121221-PR868 (21 December 2012), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr868.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr868.aspx) (last visited 11 March 2013).

<sup>28</sup> *Ibidem*.

<sup>29</sup> 'Congolese ex-militieleider vraagt asiel aan in Nederland', *NRC Handelsblad*, 11 February 2013, p. 11.

<sup>30</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre Trial Chamber II, Case No. ICC-01/09–19, 31 March 2010.

<sup>31</sup> *Prosecutor v. William Samoei Ruto, Henry Kiproni Kesgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, Case No. ICC-01/09–01/11, 23 January 2012, at para. 367; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, Case No. ICC-01/09–01/11, 23 January 2012, at para. 429.

<sup>32</sup> International Criminal Court Press Release, ICC-CPI-20120709-PR823 (9 July 2012), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pr823](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pr823) (last visited 5 October 2012).

<sup>33</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision Concerning the Start Date of Trial, Trial Chamber V, Case No. ICC-01/09–01/11, 8 March 2013, at paras. 4, 15, 17.

The trial date in the case against Muthaura and Kenyatta had already been postponed the previous day, until 9 July 2013.<sup>34</sup> In addition to disclosure matters, both Muthaura's and Kenyatta's defence team had requested that preliminary issues relating to the validity of the Confirmation Decision be referred back to the Pre-Trial Chamber.<sup>35</sup> In fact, one of the key witnesses ('Witness 4') who had testified to Muthaura's presence at a critical meeting, on which both the Prosecution and the Pre-Trial Chamber when confirming the charges had relied, turned out to have been bribed. Witness 4 was essential with respect to proving Muthaura's criminal responsibility, and moreover, was the only direct witness against him.<sup>36</sup> The Prosecution no longer relied on Witness 4 and did not intend to call him at trial.<sup>37</sup>

But the Pre-Trial Chamber will not need to rule on this specific matter, as only one of the accused in the latter Kenya case will be expected in court on the 9<sup>th</sup> of July. The debacle surrounding Witness 4 had taken its toll. In an unprecedented move, Chief Prosecutor Fatou Bensouda filed a notification on 11 March 2013 stating that her office was dropping the charges against Muthaura.<sup>38</sup> The Prosecution no longer deemed the available evidence to be sufficient for supporting the charges to the standard of 'beyond a reasonable doubt' required at trial, and therefore, there was no reasonable prospect of a conviction.<sup>39</sup> Moreover, there were numerous investigative challenges, such as the limited amount of potential witnesses, as several had died or were unwilling to testify, and the lack of cooperation from the Kenyan government.<sup>40</sup> In sum, the Ocampo six, as the suspects in the Kenyan situation were once referred to, were down to the Bensouda three. In a separate statement later that day, Bensouda emphasised that '[t]his is an exceptional decision. I did not take it lightly, but I believe it is the right thing to do.'<sup>41</sup> On 18 March 2013, Trial Chamber V issued its decision to withdraw the charges against Muthaura.<sup>42</sup>

<sup>34</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Order Concerning the Start Date of Trial, Trial Chamber V, Case No. ICC-01/09-02/11, 7 March 2013.

<sup>35</sup> *Ibidem*, at paras. 1–2.

<sup>36</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision back to the Pre-Trial Chamber, Trial Chamber V, Case No. ICC-01/09-02/11, 25 February 2013, at para. 9.

<sup>37</sup> *Ibidem*, at para. 17.

<sup>38</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura, Trial Chamber V, Case No. ICC-01/09-02/11, 11 March 2013.

<sup>39</sup> *Ibidem*, paras. 9–10.

<sup>40</sup> *Ibidem*, para. 11.

<sup>41</sup> International Criminal Court Press Release, Statement by ICC Prosecutor on the Notice to Withdraw Charges Against Mr Muthaura (11 March 2013), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx) (last visited 14 March 2013).

<sup>42</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the Withdrawal of Charges Against Mr Muthaura, Trial Chamber V, Case No. ICC-01/09-02/11, 18 March 2013.



Circumstances such as an uncooperative government and other investigative impediments are challenging in itself. But the Kenya cases faced another peculiar challenge. On 9 March 2013, Kenyatta won the presidential election in Kenya, turning the ICC case against him into the second case against a sitting head of state.<sup>43</sup> Moreover, William Ruto, to stand trial with co-accused Joshua Sang, was Kenyatta's running mate. Soon after the elections in Kenya, commentators observed that the ICC might have unintentionally played a role in Kenyatta's victory, as the Court was one of the main issues during the elections.<sup>44</sup> Mahmood Mamdan, for instance, remarked that '[t]he ICC is the single factor with the most influence on this election. The ICC process has polarised politics in Kenya because the electoral process did not unfold on a level playing field. Led by individuals who stand charged before the ICC, one side in the electoral contest is, and so it cannot contemplate defeat. The simple fact is that, if defeated, they would lose all.'<sup>45</sup> Another commentator, David Bosco, observed that the elections would not change anything from a strictly legal perspective, but that nevertheless, 'politically, a Kenyatta victory would be a serious problem for the young court, which began operations in 2002 and has struggled to establish its credibility.'<sup>46</sup> Whether or not the ICC indictments really influenced the elections is mostly speculation. But the question remains how the tasks of running a country and standing trial in The Hague are to be combined. Furthermore, problems relating to state cooperation will likely only increase.

The third example of the challenging context in which the Court must operate is the situation in Libya and its related case. To briefly recapitulate, the UN Security Council referred the situation in Libya to the Court in February 2011.<sup>47</sup> On 27 June 2011, PTC I issued three arrest warrants, but after Libya's former leader Muammar Gaddafi died in November 2011 only two suspects remained: Saif Al Islam Gaddafi

<sup>43</sup> The first case against a head of state being the case against President Al Bashir of the Republic of Sudan, who remains at large, in the Darfur situation.

<sup>44</sup> Mamdani, M., 'Mamdani on why Raila Lost', *Daily Monitor*, 10 March 2013, available at: [www.monitor.co.ug/Magazines/ThoughtIdeas/Kenya-2013--The-ICC-election/-/689844/1715440/-/mplnfd/-/index.html](http://www.monitor.co.ug/Magazines/ThoughtIdeas/Kenya-2013--The-ICC-election/-/689844/1715440/-/mplnfd/-/index.html) (last visited 13 March 2013); see also 'Did the ICC help Uhuru Kenyatta Win Kenyan Election?', *BBC News*, 11 March 2013, available at: [www.bbc.co.uk/news/world-africa-21739347](http://www.bbc.co.uk/news/world-africa-21739347) (last visited 13 March 2013); Kersten, M., 'Praise for Fatou Bensouda, in the Wake of Kenyatta and Muthaura', *Justice in Conflict*, 12 March 2013, available at: <http://justiceinconflict.org/2013/03/12/praise-for-fatou-bensouda-in-the-wake-of-kenyatta-and-muthaura/> (last visited 13 March 2013).

<sup>45</sup> Mamdani, M., 'Mamdani on why Raila Lost', *Daily Monitor*, 10 March 2013, available at: [www.monitor.co.ug/Magazines/ThoughtIdeas/Kenya-2013--The-ICC-election/-/689844/1715440/-/mplnfd/-/index.html](http://www.monitor.co.ug/Magazines/ThoughtIdeas/Kenya-2013--The-ICC-election/-/689844/1715440/-/mplnfd/-/index.html) (last visited 13 March 2013).

<sup>46</sup> Bosco, D., 'What a Kenyatta Win Would Mean for the International Criminal Court', *Foreign Policy*, 5 March 2013, available at: [http://bosco.foreignpolicy.com/posts/2013/03/05/what\\_a\\_kenyatta\\_win\\_would\\_mean\\_for\\_the\\_icc?fb\\_action\\_ids=10151607680348777&fb\\_action\\_types=og.likes&fb\\_source=timeline\\_og&action\\_object\\_map=%7B%2210151607680348777%22%3A342327569201530%7D&action\\_type\\_map=%7B%2210151607680348777%22%3A%22og.likes%22%7D&action\\_ref\\_map=%5B%5D](http://bosco.foreignpolicy.com/posts/2013/03/05/what_a_kenyatta_win_would_mean_for_the_icc?fb_action_ids=10151607680348777&fb_action_types=og.likes&fb_source=timeline_og&action_object_map=%7B%2210151607680348777%22%3A342327569201530%7D&action_type_map=%7B%2210151607680348777%22%3A%22og.likes%22%7D&action_ref_map=%5B%5D) (last visited 13 March 2013).

<sup>47</sup> Security Council Resolution 1970, UN Doc. S/RES/1970 (26 February 2011), at para. 4.



and Abdullah Al-Senussi. On 1 May 2012, Libya challenged the case's admissibility pursuant to Article 19 of the Rome Statute, but at that time only Saif Al-Islam was in Libya. Al-Senussi was being detained in Mauritania, and was not extradited to Libya until September 2012. Therefore, PTC I confined litigation on the admissibility challenge to Saif Al-Islam's case. Libya must file a separate Article 19 Application with respect to Al-Senussi.<sup>48</sup> Regarding Libya's challenge with respect to Al-Islam, the PTC I heard the parties in October 2012, but has not rendered a decision on the matter yet.<sup>49</sup>

Libya intends to try both suspects in Libya and has been eager to claim its willingness and ability to this end. But tensions between the Court and Libya increased last year when Libyan authorities detained four ICC staff members of the Court's Office of Public Counsel for the Defence (OPCD) on 7 June 2012, with detention lasting nearly a month,<sup>50</sup> after a visit to their client Saif al-Islam in Zintan.<sup>51</sup> Libya had accused one of the four staff members of smuggling spying devices and a coded letter to Saif al-Islam.<sup>52</sup> During their detention, Libyan authorities seized a number of documents from the ICC staff members, triggering litigation on the privileges and immunities of counsel acting at the Court. On 1 March 2013, PTC I issued a decision on this matter, in which it confirmed that the privileges and immunities provided for in Article 48 of the Rome Statute are applicable to the ICC staff members of the OPCD.<sup>53</sup> The Chamber also referenced the 2002 Agreement on the Privileges and Immunities of the International Criminal Court, which leads to the conclusion that although Libya is not a party to this agreement it is applicable nevertheless. As Dapo Akande pointed out, if the Rome Statute, binding on Libya through the UN Security Council's referral of the situation, makes the 2002 Agreement binding on states as well, this will also

<sup>48</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Conduct of the Proceedings Following the "Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute", Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 4 May 2012, at para. 8. At the time of writing, Libya had not filed an Article 19 Application with respect to Al-Senussi (yet).

<sup>49</sup> For a more comprehensive discussion of the course of events in the Libya situation see Fry, E., 'Human Rights News: International Criminal Court', *Netherlands Quarterly of Human Rights*, Vol. 30, No. 2, 2012, pp. 230–237, at pp. 233–235; Fry, E., 'Human Rights News: International Criminal Court', *Netherlands Quarterly of Human Rights*, Vol. 30, No. 4, 2012, pp. 489–494, at pp. 489–491.

<sup>50</sup> International Criminal Court Press Release, ICC-CPI-20120702-PR820 (2 July 2012), available at: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr820](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr820) (last visited 3 October 2012); Harding, L. and Borger, J., 'Libya Frees International Criminal Court Legal Team Accused of Spying', *The Guardian*, 2 July 2012, available at: [www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials](http://www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials) (last visited 3 October 2012).

<sup>51</sup> International Criminal Court Press Release, ICC-CPI-20120609-PR805 (9 June 2012), available at: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805) (last visited 2 October 2012).

<sup>52</sup> Harding, L., Borger, J., and Stephen, C., 'Libya Accuses Australian ICC Official of Passing Secret Letter to Gaddafi's Son', *The Guardian*, 25 June 2012, available at: [www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying](http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying) (last visited 2 October 2012).

<sup>53</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the "Urgent Defence Request", Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 1 March 2013, at para. 25.

apply to other states that are parties to the Rome Statute but have not ratified the Agreement.<sup>54</sup> The PTC further considered that ‘the inviolability of documents and materials related to the exercise of the functions of the Defence constitutes an integral part of the treatment that shall be accorded to the Defence pursuant to article 48(4) of the Statute (...).’<sup>55</sup> Given the fact that the documents were taken during an official visit authorised by the PTC and agreed to by Libya, the Chamber held that Libya must return the originals of the seized materials and destroy any copies thereof.<sup>56</sup>

In the meantime, legal developments occurred in a number of other situations and cases before the Court. With respect to Côte d’Ivoire, an additional arrest warrant was unsealed on 22 November 2012, namely for Simone Gbagbo.<sup>57</sup> There have been no reports yet of her transfer to The Netherlands. Her husband and former President Laurent Gbagbo is already in detention in The Hague. In his case, the Confirmation of Charges hearings took place from 19 February until 28 February 2013.<sup>58</sup> The Côte d’Ivoire investigation was the Prosecutor’s second *proprio motu* investigation, after Kenya. At the time, Côte d’Ivoire was not a state party of the Rome Statute but had accepted jurisdiction pursuant to Article 12(3).<sup>59</sup> Côte d’Ivoire has ratified the Rome Statute since, on 15 February 2013.<sup>60</sup>

In the Darfur (Sudan) situation, Trial Chamber IV set the date for the commencement of trial in the Banda and Jerbo case for 5 May 2014.<sup>61</sup> The charges were already confirmed in March 2011, but the Chamber deemed this delay necessary in order to make sure the trial will not be interrupted once underway. Certain matters, including disclosure issues, witness protection, and training for interpreters, need to be resolved beforehand.<sup>62</sup> The Banda and Jerbo case is the first case to go to trial out

<sup>54</sup> See Akande, D., ‘ICC Decides on Immunities and Privileges of Defence Counsel and ICC Staff’, *EJIL: Talk!*, 6 March 2013, available at: [www.ejiltalk.org/icc-decides-on-immunities-and-privileges-of-defence-counsel-and-icc-staff/](http://www.ejiltalk.org/icc-decides-on-immunities-and-privileges-of-defence-counsel-and-icc-staff/) (last visited 14 March 2013).

<sup>55</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the “Urgent Defence Request”, Pre-Trial Chamber I, Case No. ICC-01/11–01/11, 1 March 2013, at para. 25.

<sup>56</sup> *Ibidem*, at para. 27.

<sup>57</sup> International Criminal Court Press Release, ICC-CPI-20121122-PR857 (22 November 2012), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr857.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr857.aspx) (last visited 14 March 2013).

<sup>58</sup> International Criminal Court Press Release, ICC-CPI-20130228-PR876 (28 February 2013), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr876.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr876.aspx) (last visited 14 March 2013).

<sup>59</sup> *Situation in the Republic of Côte d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III, Case No. ICC-02/11, 3 October 2011, at paras. 10–15.

<sup>60</sup> International Criminal Court Press Release, ICC-ASP-20130218-PR873 (18 February 2013), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx) (last visited 14 March 2013).

<sup>61</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision Concerning the Trial Commencement Date, the Date for Final Prosecution Disclosure, and Summonses to Appear for Trial and Further Hearings, Trial Chamber IV, Case No. ICC-02/05–03/09, 6 March 2013.

<sup>62</sup> *Ibidem*, at paras. 12–15, 17.

of the Darfur situation, which was referred to the Court by the UN Security Council in March 2005.<sup>63</sup>

There have also been a couple of administrative developments at the Court. On 8 March 2013, the judges of the Court elected a new Registrar, Dutch national Herman von Hebel.<sup>64</sup> On the same day, the new Deputy Prosecutor James K. Stewart was sworn in at the Court.<sup>65</sup>

And finally, on 18 March 2013, ICC suspect Bosco Ntaganda surprised the world by showing up at the US embassy in Rwandan capital Kigali requesting to be brought to the ICC.<sup>66</sup> The Court stated it was in touch with the relevant authorities regarding his immediate transfer to The Hague.<sup>67</sup> Ntaganda is suspected of having committed war crimes and crimes against humanity, including recruiting child soldiers, murder, rape and sexual slavery, and persecution. The charges relate to his time as a militia's leader in North-Eastern DRC between 2002 and 2003.

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<sup>63</sup> Security Council Resolution 1593, UN Doc. S/RES/1593 (31 March 2005).

<sup>64</sup> International Criminal Court Press Release, ICC-CPI-20120308-PR881 (8 March 2013), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr881.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr881.aspx) (last visited 15 March 2013).

<sup>65</sup> International Criminal Court Press Release, ICC-OTP-20130308-PR879 (8 March 2013), available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr879.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr879.aspx) (last visited 15 March 2013).

<sup>66</sup> 'Bosco Ntaganda: Wanted Congolese in US Mission in Rwanda', *BBC News*, 18 March 2013, available at: [www.bbc.co.uk/news/world-africa-21835345](http://www.bbc.co.uk/news/world-africa-21835345) (last visited 20 March 2013).

<sup>67</sup> 'ICC Welcomes Bosco 'Terminator' Ntaganda's Surrender', *BBC News*, 19 March 2013, available at: [www.bbc.co.uk/news/world-africa-21842788](http://www.bbc.co.uk/news/world-africa-21842788) (last visited 20 March 2013).